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8 UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF ARIZONA

10 In Re Bard IVC Filters Products  
Liability Litigation

No. MD-15-02641-PHX-DGC

(Oral Argument Requested)

12 **PLAINTIFFS' OPPOSITION TO**  
13 **MOTION *IN LIMINE* NO. 4**  
14 **REGARDING A PATIENT AT DR.**  
**MUEHRCKE'S HOSPITAL**

15 (Assigned to the Honorable David G.  
Campbell)

16 **(Tinlin Bellwether Case)**

1 Plaintiffs oppose Defendants' Motion *in Limine* No. 4 to exclude evidence about a  
 2 recent patient of Dr. Muehrcke who suffered cardiac tamponade because of a Bard filter  
 3 strut in her heart. Bard's improper disclosure argument fails for three reasons. *First*, the  
 4 facts and opinions at issue were properly disclosed. Dr. Muehrcke already disclosed his  
 5 opinions in his report, including the opinion that "pulmonary fragments are known to  
 6 cause bleeding, hemoptysis, pneumothorax, and death. . . . an additional strut can  
 7 embolize at any time to her heart causing her to suffer cardiac tamponade and multi-organ  
 8 failure again." Exhibit A, Muehrcke Expert Report, p. 9. Dr. Muehrcke relies on his  
 9 experience as a doctor as the basis for these opinions. The specific incident Bard seeks to  
 10 exclude regarding Dr. Muehrcke's recent patient was discussed at a deposition in a related  
 11 set of cases, along with other similar incidents<sup>1</sup>. The later-occurring incident did not  
 12 change his opinions; it only served to further support his already disclosed opinions.  
 13 Bard's counsel had full and ample time to inquire about the set of facts regarding this  
 14 particular patient. That Bard's counsel did not elicit further details at Dr. Muehrcke's  
 15 deposition in this case should not bar Dr. Muehrcke from explaining how all of his  
 16 experience, including recent experiences, provide support for his opinions about the risks  
 17 of Recovery filter failure.<sup>2</sup>

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18 <sup>1</sup> For example, Dr. Muehrcke testified about the following relevant experience: "Q. What  
 19 data have you reviewed showing that the filter strut that has been in the heart for ten years  
 20 that has caused no problems can cause a problem in the future? . . . Can [you cite] any  
 21 actual data that any foreign object in the heart that's been there for more than ten years  
 22 that has caused no problems will cause a problem in the future?" Dr. Muehrcke  
 23 responded: "Well, just, . . . my clinical experience as a physician, my education, and talking  
 24 to other cardiac surgeons lead me to believe that . . . like the one we talked about earlier in  
 25 the deposition . . . years later after a Bard filter was placed where it can poke through the  
 26 heart and cause tamponade. I think it's a ticking time bomb. . . . clearly this filter is  
 27 unstable. It's already disintegrated. There's no reason why it's not going to fall apart  
 28 further and have further fragments go to the heart. The filter is tilted 20 degrees. It's not  
 functional. . . . I think that the filter has failed in a catastrophic fashion . . . And I think it's  
 dangerous to have a fragment in the heart which can perforate and kill a person at any  
 time with any heartbeat. And it can happen again because the filter is still in there."  
 Exhibit B, Muehrcke McMahill Dep. 98:7-99:23.

<sup>2</sup> Bard's contention that Plaintiff should have produced documents related to this death in  
 response to the deposition notice is without merit. There are no such documents  
 responsive to the discovery request, no discoverable documents within Plaintiff's custody  
 or control related to this incident, considering that medical records of an unrelated party  
 are protected under HIPAA. The facts and opinions Dr. Muehrcke provided are based on

1        *Second*, Dr. Muehrcke should be allowed to explain these facts to rebut any Bard  
2 contention that patients do not die from fractured Bard filters. Should Bard make any such  
3 contention, Dr. Muehrcke's testimony would directly contradict it with evidence of the risks  
4 and consequences of filter fracture.

5        *Third*, the facts and opinions are proper under Rule 702. The evidence Bard seeks  
6 to exclude—Dr. Muehrcke's experience with a patient who died from a Bard filter fracture  
7 that migrated to her heart—is part of his experience; they are facts that support his opinions,  
8 not conclusions about this case. Here, Dr. Muehrcke's principle is that a metal fragment can  
9 cause bleeding around the heart and can disrupt the functioning of that organ, which is  
10 essential to life. His method "is the application of extensive experience to analyze" the  
11 clinical data to treat patients. *See* Rule 702 Committee Notes to 2000 Amendment  
12 (indicating similar principle and method warrants admission of opinion "when a law  
13 enforcement agent testifies regarding the use of code words in a drug transaction"); *United*  
14 *States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006) (reversing exclusion of  
15 physician experience expert evidence under Rules 702 and 403 because the medical  
16 knowledge at issue was reliable and highly relevant). To the extent Bard wishes to argue at  
17 trial that there is not enough information to make any conclusions about the patient here,  
18 Bard can cross examine Dr. Muehrcke on his recollection and about the patient's medical  
19 history, which Dr. Muehrcke readily admitted was complicated. "A trial court should admit  
20 medical expert testimony if physicians would accept it as useful and reliable." *Id.*

21        With respect to Bard's Rule 403 argument, the new facts disclosed by Dr. Muehrcke  
22 are relevant and admissible. Rule 403 requires balancing probative value against unfair  
23 prejudice, but Bard has cited no cases for how this balancing should occur. To the contrary,  
24 Bard intends to argue that filters fractures do not cause harm, while precluding Dr.  
25 Muehrcke from offering facts about a relevant counter-example. *See Forrest v. Beloit Corp.*,  
26 424 F.3d 344, 355-360 (3d Cir. 2005) (noting unfair prejudice, confusion, and misleading  
27 his experience, not the underlying medical records. And Bard knew about this experience  
28 well before Dr. Muehrcke's deposition in this case, and could have conducted "a full  
exploration of the factual underpinnings of this extraordinary claim" at the deposition.  
Bard Mot. at 2.

1 nature of testimony regarding the absence of prior accidents); *Klonowski v. Int'l Armament*  
2 *Corp.*, 17 F.3d 992, 996 (7th Cir. 1994) (noting under Wisconsin law, negative evidence  
3 “generally held inadmissible”). It would be prejudicial to Plaintiffs for Dr. Muehrcke not to  
4 be able to respond that “filter struts in the heart can cause death” and provide fact-based  
5 support. Bard Mot. at 3. Bard certainly can challenge through cross examination any  
6 similarities and differences between that patient and this case as well as Dr. Muehrcke’s  
7 perception, memory, narration, and sincerity on this issue.

8 Bard has not specified any unfair prejudice other than the bald assertion that the  
9 evidence is “unfairly prejudicial facts or opinions” and “misleading.” Bard Mot. at 3.<sup>3</sup> Far  
10 from being “powerfully misleading” (Bard. Mot. at 3), the facts at issue specifically counter  
11 Bard’s blanket assertion that no one has died from a filter fracture. *C.f. Cooper v. Firestone*  
12 *Tire & Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991) (evidence of prior accident  
13 admissible to impeach claim that product is “generally safe” even with incident would be  
14 excluded if used to prove negligence, design defect, or notice) (citing *Hale v. Firestone Tire*  
15 *& Rubber Co.*, 820 F.2d 928, 935 (8th Cir. 1987) (prior accident evidence admissible to  
16 rebut contention that safety cage would protect people from injury)). Specific evidence of a  
17 patient being injured by a Bard filter rebuts Bard’s claims that filters save lives, that there  
18 have been very few failures or deaths, that fractured fragments are harmless, or that Bard  
19 employees’ relatives used Bard filters. The exclusion of such evidence would be far more  
20 unfairly prejudicial to Plaintiffs.

21 For the above stated reasons, Plaintiffs respectfully request that Defendant’s Motion  
22 *In Limine* No. 4 be denied.

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26 <sup>3</sup> Even in the tricky context of criminal cases, extrinsic acts were “not of such a heinous  
27 nature that they were likely to incite the jury to an irrational decision,” thus “the trial court  
28 did not abuse its discretion in admitting the evidence of extrinsic offenses.” *U.S. v. Hewes*,  
729 F.2d 1302, 1315 (11th Cir. 1984). Rather, a limiting instruction was appropriate to  
cure any potential prejudice. *Id.* To the extent there is any danger of prejudice here, a  
limiting instruction would be more appropriate than exclusion.

1 RESPECTFULLY SUBMITTED this 12th day of April, 2019.

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3  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of April, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ Jessica Gallentine